



DATE: July 2, 1993

CASE NO.: 93-TLC-6

In the Matter of

W.A. MALTSBERGER, d.b.a. MALTSBERGER RANCH

Employer

Appearances:

W.A. Maltzberger, Pro Se  
P.O., Box 574  
Cotulla, Texas 78014

Gary E. Bernstecker, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
Washington, D.C. 20210  
For the U.S. Department of Labor

Allen R. Moody  
P.O. Box 707  
209 West Main Street  
Rocksprings, Texas 78880  
For the Texas Ranchers Labor Association, Inc.  
Amicus Curiae

Before David A. Clarke, Jr.  
Administrative Law Judge

### DECISION AND ORDER

This is an expedited administrative judicial review requested by W.A. Maltzberger, owner of the Maltzberger Ranch (hereinafter "Maltzberger"), of the decision not to accept his application for temporary alien agricultural labor certification by the Regional Administrator of the Employment and Training Administration, United States Department of Labor (hereinafter "RA").<sup>1</sup>

---

<sup>1</sup>The Maltzberger Ranch is located in Cotulla, Texas, which is situated in La Salle County, near Lorado, in South Texas, and has been owned and operated as an open range

(continued...)

This case arises under the Immigration and Nationality Act, 8 U.S.C. § 1101, et seq., as amended by the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 100 Stat. 3411 3416 (1986), and its implementing regulations, found at 29 C.F.R. Part 655. This Decision and Order is based on the written record, consisting of the Employment and Training Administration case file (hereinafter "CF"), and is made after consideration of written submissions from the parties and the Texas Ranchers Labor Association, Inc., Amicus Curiae. 20 C.F.R. § 655.112(a)(2).

## PROCEDURAL HISTORY

On June 3, 1993, Maltsberger filed an application for temporary alien agricultural labor certification, or so-called "H-2A" workers, for the position of cattle ranch worker.<sup>2</sup> (CF at 67.) The application was for fourteen openings, to tend cattle for the period of September 3, 1993, to August 15, 1994. (CF at 67-68.)

The cattle ranch workers' principal duties would be performed both on horseback and on foot, as applicable, and would include herding and tending cattle; calving, castrating, and branding livestock; protecting the herd from weather, predators, and noxious plants; and examining the livestock for disease, injury or infestation. (CF at 72.) The job also would require the cattle ranch workers to cut and clean brush; shoe and care for saddle horses and mules; check, repair and maintain water and feed troughs, pumps, tanks and windmills; and check and maintain hay fields, pastures and rangeland. (CF at 72.) Furthermore, the cattle ranch workers could also have incidental tasks, such as maintaining and repairing waterways and roads; cleaning barns and sheds; servicing machinery and equipment; breaking and training young horses; and planting, cultivating and harvesting grain and forage used as feed for livestock. (CF at 72.)

The job would pay \$669.00 per month, and would require the cattle ranch workers to be on call twenty-four hours a day, seven days a week, including Sundays and holidays. (CF at 67, 70.) The cattle ranch workers would be required to live on the cattle ranch, and Maltsberger would provide on-site housing and board. (CF at 73.)

To demonstrate his need for having a cadre of on-call, temporary employees, Maltsberger explained that with the unpredictable climate of South Texas his ranch could either have a dry spring or a dry fall, which would create an emergency feeding situation requiring temporary workers to begin feeding the livestock within 30 to 45 days, or his ranch could have normal rainfall, which would leave the ranch in good shape. at 44.) (CF Maltsberger stated that in August 1991, he applied for temporary alien labor certification for the first time, and while his cover later stated the seriousness of his need, emergency consideration was refused, and the

---

<sup>1</sup>(...continued)  
livestock producer by the Maltsberger family since the 1880's. (CF at 18, 21-22, 24, 44.)

<sup>2</sup> The H-2A worker is so named because of the H-2A visa issued to qualified nonimmigrant aliens who are certified as temporary agricultural employees.

response was "impossibly long," resulting in thousands of dollars in reduced animal performance, nutrition related birth defects, and high feed cost. (CF at 44.) For this reason, Maltzberger stated that he could not wait for a dry spell and then apply for labor certification. In addition, he stated that the H-2A workers he has hired in the past do not want to abandon their families in Mexico and are only willing to work about five to eight weeks at a time before returning to Mexico for two to four weeks and that therefore they are by nature temporary workers. (CF at 44.)

Maltzberger submitted a copy of his August 19, 1991 letter, which he had sent to the RA when he first applied for temporary labor certification, which explained that the ranch was "in an emergency" due to extreme dryness and a copper deficiency in the cattle, that his two hired hands were not enough labor to feed and care for his cattle, and that he had exhausted all means of recruiting labor. (CF at 52.) In addition, he submitted a newspaper article entitled Some Find a Profit in Drought, Express-News, May 19, 1993, at 1A, 8A, which discussed the feeding difficulties caused by a shortage of rain in Nuevo Leon, Mexico, near South Texas, (CF at 63-64), and an article from a trade journal, Drought Strikes Mexico, 15 Texas and SW Cattle Raisers Ass'n 2 (1993), describing a nine-month-long drought occurring in northern Mexico, (CF at 65-66).

Maltzberger also submitted a letter from John D. Clader, Doctor of Veterinary Medicine at the Chaparral Veterinary Center, Jourdan, Texas, dated June 2, 1993, which stated that owing to many factors, Maltzberger's labor requirements were seasonal. (CF at 40.) Dr. Clader stated that the vagaries of weather in South Texas, such as drought related to an untimely freeze, often necessitated supplemental feeding; that the Maltzberger herd was chronically deficient in copper and therefore required cupric glycinate injections; and that the cattle were bred to calve either spring or fall during a 120 day period, requiring intense management to prevent neonatal death loss. (CF at 40.)

On June 9, 1993, the RA sent Maltzberger a notice of nonacceptance, stating that his application for alien labor certification was not accepted for consideration because the job opening was not of a temporary or seasonal nature, as defined at 20 C.F.R. § 655.100(c). (CF at 29.) Specifically, the RA stated that Maltzberger's previous H-2A applications established that his need for workers was permanent rather than temporary. (CF at 29.) To support her decision, the RA stated that in 1991 and 1992, Maltzberger applied for H-2A certification for fourteen Cattle Ranch Workers for the work periods of October 20, 1991, to October 19, 1992, and October 5, 1992, to September 16, 1992, respectively. (CF at 29.) On both occasions, certification was granted. (CF at 29.) While the RA recognized that the work was actually performed on an intermittent, and at times unpredictable, temporary basis, she concluded that based on Maltzberger's application history, his need was not for less than a one year period, thereby making this application unacceptable for processing under the H-2A program. (CF at 30.)

The RA proposed two alternative means through which Maltzberger could seek to obtain certification. First, acknowledging Maltzberger's assertion that the unpredictability of his need sometimes precluded him from applying 60 days in advance, the RA stated that if Maltzberger

would draw upon his past experiences and make his best estimate of two or more shorter time periods during which he will have a need for additional workers, she would give prompt attention to his applications for each period of temporary employment. (CF at 30.) The H-2A regulations take such conditions into account, the RA noted, in the emergency provisions for expedited certification, at 20 C.F.R. § 655.101(f)(2). (CF at 30.) Second, the RA suggested that Maltsberger consider obtaining permanent labor certification under section 212(a)(14) of the Immigration and Nationality Act. (CF at 31.)

On June 14, 1993, within the prescribed time limits, 20 C.F.R. § 655.104(c)(3), Maltsberger filed his request for administrative review of the RA's decision not to accept his application. (CF at 13-28.)

On June 16, 1993, by telephone conference with this office, the parties agreed to submit position statements by June 22, 1993. The RA, through counsel, subsequently filed a motion to extend the time for submitting position statements in the above-captioned case to June 25, 1993. As grounds for her motion, the RA stated that the extension would facilitate on-going settlement discussions and that the attorney responsible for this matter did not receive a copy of the appeal file until June 22, 1993, because the appeal file was sent by regular mail rather than express mail. Maltsberger was contacted by my office, and he stated that he did not object to the RA's Motion. Accordingly, the request was granted.

On June 22, 1993 the Employment and Training Administration case file {CF} was delivered to this office. Maltsberger submitted position papers on June 18, 21 and 30, 1993. Allen R. Moody, Texas Ranchers Labor Association, Inc., submitted a position paper, Amicus Curiae, on June 22, 1993. The RA submitted her position paper on June 25, 1993.

## ISSUE

The issue in this case is whether alien cattle ranchers who cross the border from Mexico to work on a Texas livestock ranch when supplemental help is necessary due to predictable and unpredictable events, and who are willing to work only five to eight week periods before returning to Mexico for two to four weeks, are temporary or seasonal workers.

## DISCUSSION

To obtain temporary alien agricultural labor certification, an employer must establish: (1) that the aliens have a residence in a foreign country and have no intention of abandoning such residence; (2) that the aliens will be coming temporarily to the United States; (3) that the aliens will perform temporary or seasonal services or labor of an agricultural nature; and (4) that able and willing U.S. workers, capable of performing the agricultural services or labor, cannot be found in this country.<sup>3</sup> Cf. Sussex Engineering, Ltd. v. Montgomery, 825 F.2d 1084, 1089 (6th Cir. 1987).

---

<sup>3</sup> Agricultural labor or services includes raising, feeding, caring for, training, and management of livestock. 20 C.F.R. § 655.100(c)(1)(i).

The U.S. Department of Labor (hereinafter "DOL") regulations define "of a temporary or seasonal nature" as follows:

Labor is performed on a seasonal basis, where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year.

...

A worker is employed on "other temporary basis" where he is employed for a limited time only or his performance is contemplated for a particular piece of work, usually of a short duration. Generally, employment, which is contemplated to continue indefinitely, is not temporary.

20 C.F.R. § 655.100c(2)(ii). In addition, DOL regulations define "temporary" as

any job opportunity . . . where the employer needs a worker for a position, either temporary or permanent, for a limited period of time, which shall be for less than one year, unless the original temporary alien agricultural labor certification is extended based on unforeseen circumstances . . . .

§ 655.100(c)(2)(iii).

The temporary alien agricultural labor statute has two purposes: to assure employers an adequate labor force and to protect the jobs of United States citizens. Flecha v. Quiros, 567 F.2d 1154, 1156 (1st Cir. 1977). As with any statutory scheme consisting of competing purposes, a balance must be maintained between the statute's goals. Id. at 1156.

In his position statement, Maltsberger stated that there is a high turnover rate for temporary ranch workers coming into the United States from Mexico and that a ranch worker who is granted permanent status would likely quit the ranch job and take a higher paying job in another industry in this country. (Emp. Letter dated June 17, 1993, at p. 5.) This seems to have happened with alien sheepherders in the United States. The DOL, in Field Memorandum No. 74-89, dated May 31, 1989, reported that a House Judiciary Committee investigation had found that many aliens skilled in sheepherding, who had been granted special privileges to gain entry into the United States during the early 1950's on an expedited basis, were leaving sheepherding shortly after arriving and taking employment in other industries and occupations.<sup>4</sup> (CF at 87-88;

---

<sup>4</sup> Sheepherding is similar to the range production of other livestock. 52 Fed. Reg. 20497 (1987).

(continued...)

citing H.R. Rep. No. 67, 85th Cong., 1st Sess. (1957).) Furthermore, Maltzberger stated that for the past two years neither DOL nor the Texas Employment Commission have been successful in attempts to recruit qualified U.S. cattle ranch workers willing to live and work on his ranch. (Emp. Letter dated June 17, 1993, at p. 4.) In view of Maltzberger's years of experience cattle ranching and the reported prior experiences with alien shepherders, Maltzberger's representations that the aliens in question would likely seek employment elsewhere in the United States if given permanent labor status appears realistic.

The RA restated the reasons for denial in her position paper filed in this case. She quoted the preamble to the regulations, 52 Fed. Reg. 20496, 20498 (1987), which states that the longer the employer's need for a temporary worker, the more likely the need is actually permanent, and she stated that DOL will grant certification for a cumulative period (including past and future certifications) of twelve months or more only in extraordinary circumstances. (RA Mem. at 3-4.) Considering the facts of this case and the extraordinary circumstances Maltzberger faces as a cattle rancher in South Texas (i.e., weather, labor, raising animals, dealing with predators, etc.), I find Maltzberger's arguments more persuasive than those of the RA.

The record indicates that Maltzberger has a frequent, unpredictable need for temporary cattle ranch workers, and that in the past he has been unable to find U.S. workers who are ready, willing and able to perform the work. Moreover, the record indicates that it is impractical for Maltzberger to apply for workers on a job-by-job basis, because his need for temporary workers varies from time to time and may be in response to emergency situations requiring immediate action, and because DOL's process for granting temporary certification takes more time than may be available in the event of an emergency, which could result in economic loss. Furthermore, because the aliens are only willing to work in this country for five to eight weeks before returning to Mexico to be with their families, Maltzberger's efforts to maintain the aliens' work status as temporary while at the same time ensuring a supply of temporary alien labor as needed to satisfy his business demands appears reasonable. Given the circumstances, it does not appear that Maltzberger is attempting to use temporary alien agriculture certification to avoid the more rigorous standard of 8 U.S.C. § 1101(a)(15)(H)(ii), permanent alien labor certification. For these reasons, I find that the Maltzberger cattle ranch job opportunities are for agricultural services or labor of a temporary or seasonal nature, within the meaning of the statute, and that his application for temporary labor certification should be accepted.

---

<sup>4</sup>(...continued)

The unique occupational characteristics of shepherding (spending extended periods of time grazing herds of sheep in isolated mountainous terrain; being on call to protect flocks from predators 24 hours a day, 7 days a week) have been recognized . . . as significant factors in limiting the number of U.S. workers who might be interested in and capable of performing these jobs.

(DOL Field Memorandum No. 74-89.).

ORDER

Accordingly, it is ORDERED that the Regional Administrator accept Maltsberger's application for temporary alien agricultural labor certification.

DAVID A. CLARKE, JR.  
Administrative Law Judge

DAC/cal